IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 120 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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BHAVANISINH VAGHUBHA ZALA

Versus

STATE OF GUJRAT

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Appearance:

1. Criminal Revision Application No. 120 of 1995

MR SAURIN A SHAH for Petitioner

MS NANDINI JOSHI, APP for Respondent - State

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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 21/04/2003

ORAL JUDGEMENT

1. This Criminal Revision Application is filed under Section 397 read with Section 401 of the Criminal Procedure Code, 1973 [for short "Code"], in order to challenge the judgment and conviction order dated

13.10.1993, rendered by the learned Sessions Judge, Bhavnagar in Criminal Appeal No.32 of 1989, who dismissed the same and confirmed the judgment and conviction order dated 26.07.1989 passed by the learned Judicial Magistrate, First Class, Sihor, in Criminal Case No.101 of 1988. By the aforesaid judgment, the learned Magistrate of the trial Court has convicted the present petitioner for the offences punishable under Sections 279, 337, 304-A of I.P.C. and under Sections 112, 116, 118 and 85 of the Motor Vehicles Act, 1939 and sentenced the petitioner to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000-00 and in default of payment, the petitioner was required to suffer further simple imprisonment for one month.

2. The facts of the prosecution case before the trial Court may be briefly stated as follows :-

2.1 On 26.01.1988, the petitioner was driving a mini truck (Matador i.e. a goods vehicle) bearing Registration No.GTS 8783 at about 9.30 A.M. on Bhavnagar - Ahmedabad Road, oil tins were carried therein by the petitioner and he allowed P.W.1 Deepsingh Bachubhai, Ex.4 and P.W.3 Anjuben Ravjibhai, Ex.18 and other persons to travel in the said goods vehicle. According to the case of the prosecution, at the place of accident, the petitioner, herein, was trying to ignite Bidi and in the said process, he lost control over the steering vehicle, as a result of which, the said vehicle left the road and went away by the side of the road and fell in a pit away from the road. On account of the aforesaid accident, three persons passed away and other two persons sustained injuries. The prosecution has, therefore, alleged that the petitioner drove his vehicle rashly or negligently. The prosecution has further alleged that the petitioner has caused injuries to the prosecution witnesses by the said act of rash and negligent driving. It is further alleged by the prosecution that the petitioner has caused the death of three persons, who were travelling in the said vehicle driven by the present petitioner.

3. After the accident, F.I.R. was filed against the present petitioner. The petitioner was arrested. The Investigating Officer has recorded the statements of witnesses. Post-mortem was also carried out in respect of the persons, who died in the said accident. At the end of the investigation, the Investigating Officer submitted the charge-sheet before the learned Judicial Magistrate, First Class, Sihor, District Bhavnagar and it was registered as Criminal Case No.101 of 1988.

4. The learned Magistrate provided copies of police investigation papers to the petitioner. His plea was recorded. The petitioner pleaded not guilty and claimed to be tried. Thereafter, evidence was recorded. Thereafter, further statement of the petitioner under Section 313 of the Code was recorded. After hearing the arguments, the learned Magistrate found the petitioner guilty and, therefore, he pronounced the judgment inflicting punishment as aforesaid.

5. Feeling aggrieved by the judgment and order of the trial Court, the petitioner, herein, preferred Criminal Appeal No.32 of 1989 unsuccessfully, hence, the present Criminal Revision Application.

6. It has been contended before this Court that the trial Court did not have sufficient material to pass the order of conviction for the aforesaid offences. Even I.O. has not obtained a report from the Motor Vehicle Inspector about the condition of the vehicle involved in the accident. That the prosecution has not proved on record that the accident took place on account of rash and negligent driving on the part of the petitioner. Therefore, the trial court as well as Sessions Court, both have committed serious error in law in convicting the present petitioner and, therefore, the judgment and conviction order of the Courts below are illegal and perverse. That the appeal may, therefore, be allowed and the judgments of the Courts below may be quashed and set aside and the petitioner may be acquitted of the offence for which he stood charged before the trial Court.

7. On receipt of the Criminal Revision Application, it was ordered to be admitted and rule was issued. In response to the service of notice of rule, Ms.Nandini Joshi, learned APP appeared on behalf of the respondent State of Gujarat. I have heard Mr.Saurin A. Shah, learned advocate for the petitioner and Ms.Nandini Joshi, learned APP for the respondent - State of Gujarat. Both have taken me through the evidence including F.I.R. and panchnama also. She has also taken me through the observations of both the Courts below.

8. It has been mainly argued by the learned advocate for the petitioner that there was no evidence to show that the petitioner was driving the vehicle at a very high speed. That, since the vehicle was being driven on a highway, the petitioner was excepted to drive the said vehicle on a highway at a reasonably high speed and, therefore, the speed would not be a relevant consideration.

9. On going through the evidence, it can be gathered from the evidence of P.W.1 Deepsingh Bachubhai, Ex.4 and P.W.3 Anjuben Ravjibhai, Ex.18, that the petitioner was driving the vehicle at a very high speed. Out of them, P.W.1 Deepsingh Bachubhai, Ex.4, has stated in para-8 of his cross-examination that the petitioner was driving the said vehicle at a high speed at about 60 to 80 k.m. per hour. Whereas, P.W.3 Anjuben, Ex.18 could not say about the actual speed of the vehicle, at the relevant point of time.

10. Further it is a matter of fact and matter of record that the vehicle turtled and it left the road and went away to go in pit by the side of the road. Even as per evidence of panchnama, the vehicle was found at a distance of about 75 feet from the road. At that time, the vehicle was found in such a condition that the wheels were towards the sky. This evidence of panchnama indicates that the petitioner was though going on a highway, he was unable to control his vehicle. The relevant portion can be seen from para-3 of the panchnama Ex.17.

11. The oral evidence of P.W. Deepsingh and Anjuben supported by the written complaint of Deepsingh at Ex.4A and the panchnama of the scene of the offence, if read together, conclusively proves that the petitioner was in the process of igniting Bidi and in the process, his concentration was diverted and hence he totally lost control over the vehicle which resulted in the unfortunate accident which further resulted in the death of three humans and injuries to, at least two persons. The fact that the vehicle totally went out of control and went off the road at a distance of 75 feet, clearly establishes that there was culpable/criminal negligence on the part of the petitioner.

12. The learned advocate for the petitioner has read out the portion from the evidence of Deepsingh, Ex.4. In para-14, he has stated that the driver tried to keep the vehicle on the road. Let us take it that the petitioner actually made an attempt, as has been stated by this witness, but this also shows that the vehicle was being driven at a very high speed and, therefore, despite the efforts of the petitioner, on account of high speed, the vehicle could not be brought under control and could not be brought back on the road. In that view of the matter, it has to be accepted that both courts below were justified in holding that the petitioner was driving the vehicle in a very negligent manner. Deepsingh, Ex.4 and

Anjuben, Ex.18, both have stated that the petitioner was in a process of igniting Bidi and in the said process, the vehicle went off the road and met with an accident. Deepsingh, Ex.4, was very much clear in his evidence and therein he has stated that while the petitioner was in the process of igniting Bidi, he lost his control over the vehicle and, therefore, all the persons, who were travelling in the said vehicle had fallen on the ground along with oil tins.

13. It has to be observed that this fact of igniting Bidi has not come on record for the first time in evidence. Even in the F.I.R., this fact is already there. This means that the said fact was placed on record right from the first event and the witnesses have been consistently saying that the petitioner was in process of igniting Bidi and, therefore, he lost his control over the steering wheel and the vehicle went away from the road and fell in pit by the side of the road at a distance of about 75 feet.

14. It has also been argued by the learned advocate for the petitioner that I.O. did not get the vehicle involved in the accident, examined through a motor vehicle Inspector so to ascertain whether there was any mechanical defect in the said vehicle or not. For this purpose, the learned advocate for the petitioner has relied upon a case of Nageshwar Shri Krishna Ghobe Vs. State of Maharashtra, reported in 1973 S.C.C. (Cri.) 664. There it has been clearly observed that the vehicle should be examined by the expert and the report should be obtained by the I.O. and should be produced on record. For this purpose, we may refer the observations of paras-9 & 10 from the said decision as follows :-

> "9..... Examination of the marks of wheels on the road would have been very useful in appreciating other evidence. What is more surprising is that even evidence on the state of the traffic on the road on the road at the relevant time and on the height of the kerb has not been produced by the prosecution. This evidence would have clearly helped the court in having a clearer picture of the position and in more satisfactorily appreciating the circumstances in which the accident occurred. If there was meagre traffic, then, there was a greater likelihood of the appellant being able to see the running bhaiya more clearly, whereas if traffic was heavy then there was a chance of the bhaiya emerging from behind some vehicle

unnoticed by the appellant. Similarly the height of the kerb was a relevant factor to be considered in forming an opinion about the likely speed of the bus. The prosecution failed to appreciate the importance of these aspects and did not care to adduce any evidence on them. This reflects a high degree of inefficiency on the part of the investigating agency. The High Court has, however, observed (perhaps on the basis of personal knowledge of the learned Chief Justice who decided the appeal in the High Court) that the road at that time was more than normally crowded. If that was so then it was a question for consideration as to from how much distance was the appellant able to see the bhaiya running, in his anxiety, to cross the road. The High Court did not advert to this aspect at all. Indeed, at one place the High Court has observed that the appellant would have noticed the bhaiya when he was running to cross the road. This could be possible only on the assumption that the traffic on the road was not very heavy and it did not block the appellant's vision. The High Court has also observed that this was not the first time when an investigation in a case where the public motor vehicle belonging to a public body was involved in an accident had been utterly perfunctory. The fact that this was not the first occasion of inefficient and perfunctory investigation in such cases, could not, in our view, serve as an argument for placing premium on the inefficiency of the investigating agency and for convicting the accused, which could only be done if the evidence had established his guilt beyond reasonable doubt.

10. no doubt when an accident like the present takes place the naturally expects the driver concerned to explain the circumstances in which he was obliged to take the bus on to the footpath and to strike against one electric pole with such force, thereby killing one human being and injuring several others. The satisfactory nature of the explanation to absolve him of his criminal liability for the accident has, in such circumstances, to be appraised in the light of the entire evidence on the record. The onus of course remains on the prosecution and does not shift to the accused. The evidence of the bus, however, having mounted on to the footpath, which, in the normal course, does not happen, is

admissible and has to be duly taken into account in understanding and evaluating the entire evidence led in the case and in appraising the value of the explanation given by the accused for his compulsion which resulted in the accident. The appellant's explanation, even though not conclusive, does, in the absence of the testimony of the bhaiya and of at least some out of the passengers, said to have been travelling in the bus, who might have been able to throw some helpful light on the relevant circumstances, seem to leave fair scope for reasonable doubt about his guilt. Whether the failure on the part of the investigating agency to contact persons who would have given useful material evidence relevant for finding the truth was due to inefficiency or was deliberate having been inspired by some other motive, is not for us to speculate on the existing record. Suffice it to say that, if it appears, as it does in this case, that material evidence has not been collected by the investigating agency for reasons which are wholly inconveniencing and the evidence actually produced, leaves a serious lacuna in bringing his guilt home to the appellant, then, merely because the nature of the accident prima facie requires an explanation from the driver, would not be sufficient to sustain his conviction, if the truth of his explanation, which is not liable to rejection outright, could have been appropriately judged if the evidence left out by the prosecution has been produced....."

15. However, it is required to be considered that in para-3 of the said decision, the defence of the accused has been referred at page 665, which may be reproduced for ready reference as follows :-

"3. According to the appellant, he was driving the bus at a moderate speed from east to west along the southern side of Tilak road when suddenly a bhaiya, in his attempt to cross the road, came near the right wheel of the bus. He was noticed by the appellant when he was about 3 ft. away from the front right portion of the bus. In order to avoid him the appellant applied his brakes and took a turn to the left, thereby mounting the southern footpath and it was in these circumstances that he struck against the electric pole. The accident, according to his plea, occurred because of circumstances beyond

his control. The Presidency Magistrate did not believe the defence version and observed :

"According to the accused he was going at a speed as if he was approaching a bus stop. If that were so and if Harbansingh was crossing the road from north to south as alleged by the defence and if the accused applied his brakes after seeing the bhaiya, them it is hard to see how the bus did not stop there and then. The bus however went on to the southern footpath and dashed against the electric pole with such a force that it was uprooted. The fact that the accused was not able to halt the bus there and then show that the bus was in good speed. The accused could not control its speed in time. It, therefore, held that the prosecution had established its case against the accused."

16. Therefore, it has to be considered that with a view to reply the said defence of the accused in the said case, it was found very much necessary for I.O. to get expert report on examination of the vehicle in order to show that the vehicle was fit to be carried on a public road.

17. The learned advocate for the petitioner has cited another decision in the case of Shivaputra Mahadevappa Hadapad Vs. State of Mysore, reported in 1970 Cri.L.J. 1551. The relevant observation may be reproduced from para-5 of the said decision for ready reference as follows :-

"........There could not general presumption that the fact that a car leaves a road, is evidence of a rash and negligent driving. A motor vehicle may leave the road, and proceed on the margin or collide against some fixed structure of the margin, under a variety of circumstances. Some of those circumstances certainly may probabilise rash and negligent driving, but many other circumstances may not. There can be no burden on an accused to prove that he was not driving the vehicle in a rash and negligent manner because the prosecution proves the fact that the car left the road. For instance, as is the case with regard to all mechanisms there may be innumerable circumstances of defect not even within the knowledge of the driver of the vehicle. The road may be wet,

> slippery, or in some manner unsafe. The connection between the steering mechanism and the propelling mechanism in the car, might have been broken, or put out of gear, owing to a large variety of causes. In such a situation, the driver himself may not know why the car suddenly behaved in that manner fraught with such danger to the driver himself and to the other occupants of the car. It is difficult to appreciate how the driver could establish or prove a fact such as the disconnection of a particular mechanism of which he himself might have been genuinely unaware."

18. It has also been observed in it that a motor vehicle may leave the road, and proceed on the margin or collide against some fixed structure of the margin, under a variety of circumstances.

19. In the present case, we find that the witnesses have stated before the trial Court that the petitioner was in a process of igniting Bidi and lost his control over the steering of the vehicle and, therefore, the accident took place. The petitioner will not be entitled to get any benefit of doubt on the ground that the expert report was not produced on record.

20. It is required to be considered that these witnesses were cross-examined at length and though the witnesses come from a distant rural place, their evidence has not been shaken to any extent. The Courts below have found it proper to depend upon their evidence and even before this Court, it was not possible for the learned advocate for the petitioner to assail their evidence.

21. In above view of the matter, simply because the report of the examination of the motor vehicle was not obtained and the same was not produced before the trial Court, it would not entitle the petitioner to get benefit of reasonable doubt.

22. It has then been contended that in the present case, the evidence of I.O. was recorded by the trial Court on 28.07.1989 at Ex.28. It has also been argued that before the said day, the further statement of the petitioner under Section 313 of Code was recorded on 28.06.1989. After verifying the record and proceeding of the trial Court, it is found that the evidence of the I.O. was recorded on 28.06.1989 and not on 28.07.1989 at Ex.28 and during the course of his evidence, the letter and F.I.R. were produced. Even otherwise, it is not

found to be probable that the evidence of the said witness could have been recorded on 28.07.1989 and not on 28.06.1989. Even the argument that there is no reference to the evidence of the said witnesses in day-to-day proceeding (i.e. Rojnama), is also not correct because on verifying the original record, I have noticed that in the proceeding of 28.06.1989, reference to the recording of the evidence of the I.O. has been made.

It is a matter of record that the trial Court had disposed of the criminal case concerned on 26.07.1989, and thereafter, there could not be any further proceedings and even the petitioner - convict would not be present in the Court for facing the trial after disposal of the case. Therefore, there is human error in noting the date in question. There is no legal infirmity on record.

23. At the same time, it has also been contended that since the evidence of the I.O. was recorded after recording of further statement under Section 313 of the Code, the Court did not refer the evidence of I.O. to the petitioner while recording the said statement. It is true that there is a reference in the proceedings on 28.06.1989 that the further statement of the petitioner was recorded on that date. However, it seems that there may be an error on the part of the office of the learned Magistrate in showing about the recording of the further statement first and, thereafter, the recording of the evidence were shown in the proceeding of 28.06.1989. It seems that it has not been contended before the learned Magistrate or before the Sessions Court that the evidence of the I.O. was recorded after recording further statement of the petitioner under Section 313 of the Code. In the memo of Revision also, it does not appear to be a ground of the petitioner that the evidence of the I.O. was recorded after recording of the further statement of the petitioner under Section 313 of the Code. At the same time, it cannot be disputed that the fact of evidence of I.O. at Ex.28 does not appear to have been put during the course of the further statement under Section 313 of the Code. It has to be accepted that whatever circumstances coming on record and appearing in the evidence against the petitioner are required to be put to him in order to enable him to render his explanation with respect to the circumstances appearing in evidence against him. Therefore, it has to be accepted that the evidence of the said witness, I.O. does not appear to have been put to the petitioner.

24. In this regard, we may refer to a decision in the

case of Usha K. Pillai Vs. Raj K. Srinivas and anothers, reported in AIR 1993 S.C. 2090. In para-3 of the said decision, Hon'ble the Supreme Court has laid down that Clause (b) of Section 313 of Code uses the expression "shall" to convey that it is mandatory for the Court to examine the accused after the witnesses for the prosecution have been examined before he is called upon to produce his defence.

25. It is further said in it that if the Court on completion of the prosecution evidence finds that there are certain circumstances appearing in evidence against the accused, the Court is obliged by Cl.(b) to question the accused before he is called on for his defence. This proviso is general in nature and applies to all inquiries and trials under the Code. The purpose of the said provision is to give the accused an opportunity to explain the circumstances appearing against him in evidence tendered by the prosecution so that the said explanation can be weighed vis-a-vis the prosecution evidence, before the Court reaches its conclusion in that behalf. It is thus clear on a plain reading of S.313(1) of the Code, that the court is empowered by Cl.(a) to question the accused at any stage of the inquiry or trial while Cl.(b) obliges the Court to question the accused, before he enters on his defence on any circumstance appearing in the prosecution evidence against him. The section incorporates a rule of audi alteram partem and is actually intended for the benefit of the accused person.

26. It has, therefore, been argued that the proceeding against the petitioner stand vitiated in absence of his examination on the point of the evidence of the I.O.

27. However, at the best it may be considered that the evidence which has not been put to the accused /petitioner may not be taken into consideration. In the present case, we find that the police officer who has investigated the case also seems to have filed F.I.R. It seems to have been filed on a written and signed information of eye witness Deepsingh. However, the eye witnesses have proved the negligent manner in which the petitioner was driving the good vehicle at the time when the accident was about to take place and when it did take place. The said evidence including the written and signed information was put to the petitioner during his examination under Section 313 of the Code. The requirement of Section 313 of the Code has, thus, been complied with. Even if we ignore the I.O. then also the proceedings would not stand vitiated and petitioner would

not get any benefit of non-examination of the petitioner with respect to the evidence of the I.O.

28. In above view of the matter, the trial Court as well as the Sessions court have properly considered the evidence. This Court is also not required to discuss the evidence again. However, the learned advocate for the petitioner has argued the matter at length and has taken me through the relevant portions of the judgment of the Courts below. Therefore, I feel it be my duty to refer the same and discuss the same at least in a brief manner.

29. On the aforesaid facts and circumstances of the case, it has to be accepted that the trial Court as well as the Sessions Court have not committed any error by holding that the petitioner's driving of the vehicle was so rash or negligent, that it would endanger human life or personal safety of others and by such a rash or negligent act of driving of matador, the petitioner caused the death of three persons and caused injuries to two persons. The said fact of death has been proved by post-mortem notes also and injuries have been proved by the medical evidence on record, which is not in dispute before this Court also. Therefore, the proceedings would not stand vitiated on account of non-examination of the petitioner under Section 313 of the Code with respect to the evidence of the I.O.

30. In the alternative, the learned advocate for the petitioner has submitted that the petitioner may be extended the benefit of probation under Section 360 of the Code. A decision of this Court in Criminal Revision Application No.372 of 1994 [Coram : J.M.Panchal,J.] recorded on 28.02.1995 in the case of Shambhubhai Versibhai Rabari Vs. The State of Gujarat, was referred. I have taken it into consideration. After all the quantum of punishment is a matter of description of the Court. There cannot be any hard and fast rule with respect to the quantum of punishment. It is required to be considered that in para-6 of the said Criminal Revision Application No.372 of 1994 decided on 28.02.1995, this Court has observed that the learned counsel for the petitioner, initially tried to challenge the order of conviction but after perusing the records of the case fairly stated that it would be difficult for him, in revision, to challenge the concurrent findings of facts reached by the courts below that the accident in question was caused on account of the rash and negligent driving on the part of the petitioner. In that view of the matter, it is not necessary for this court to go into greater details about the findings of facts reached by

both the courts below. Any way, the benefit of probation was extended in that case on the facts and circumstances of that case.

31. However, it is also required to be considered that with the increase in population, there is high degree of increase in the number of motor vehicles occupying almost the entire road. Then, there is a considerable increase in road accidents. Despite the fact that now the roads have been widened to a great extent, the number of accidents has also been increased to a great extent. It is true that the criminal case was disposed of by the trial Court before a few years and appeal was also dismissed before a few years. It is a fact that some passengers were illegally travelling in a goods vehicle, three of them have died and at least two have suffered injuries. The vehicle was carried away from the road to a distance of 75 feet. Looking to the facts and circumstances of the case and looking to the nature of the offence and the manner in which it has been committed, I am of the view that there is no justification for reduction of punishment or for granting benefit of probation under Section 360 of the Code or under Section 4 of the Probation of Offenders Act, 1958.

32. At this stage, the learned advocate for the petitioner - convict, has raised the following points -

[A] There is no proof of the fact that the petitioner - convict was the driver of the vehicle concerned at the time of the accident.

[B] The F.I.R. filed by the I.O. was not put to the petitioner during the course of his examination under Section 313 of the Code.

33. Now so far the first contention is concerned, it has not been raised as a ground in the memo of Revision. This has been clarified by the learned advocate for the petitioner after verifying the Revision Memo. P.W.1 Deepsingh, Ex.4 and P.W.3 Anjuben, Ex.18 both were travelling in this goods vehicle along with the driver petitioner - convict. Both have deposed that the petitioner was driving this goods vehicle at the time of the accident. P.W. Deepsingh had earlier disclosed this fact in his signed statement before the police also. He also said in his evidence before the trial Court that he knew the petitioner, but he did not know his name. Yet, this witness has also given details of the residential address of the convict. Two courts have accepted that the petitioner - convict was the driver of the concerned

vehicle at the relevant time. This is a finding of fact recorded on appreciation of evidence. This finding of fact recorded by the two courts below is not based on no evidence. It is not possible for this court, exercising revisional jurisdiction, to dislodge the said concurrent findings of fact recorded by the two courts below on appreciation of evidence on record. This finding of fact is, therefore, not illegal. I accept and confirm the said concurrent findings of fact recorded by the two courts below and hold that two courts were legally and factually justified in holding that the petitioner was driving the goods vehicle in question at the time of the accident.

34. With respect to the second contention, it may be noted that the first signed statement of P.W. Deepsingh, Ex.4A was put to the petitioner - convict during his examination under Section 313 of the Code, wherein it was disclosed by him that the petitioner - convict ignited Bidi and it resulted in the unfortunate accident. So, even if we accept that the oral evidence of the I.O. and his F.I.R. were not put to the petitioner during his examination under Section 313 of the Code, we may ignore the same from our consideration but it would not vitiate the proceedings. Even if the evidence of I.O. and his F.I.R., both are ignored, there remains the evidence of Deepsingh and Anjuben who have deposed about he identity of the petitioner and his gross criminal and culpable negligence from which the case of the prosecution against the petitioner - convict has been conclusively proved beyond any reasonable doubt.

35. Non examination of an accused under Section 313 of the Code on a particular evidence, by itself, would not vitiate the entire criminal proceeding in all cases. At the best, that particular evidence may be ignored. If this process is undertaken in the case on hand, then the I.O. and his F.I.R. would be an evidence of formal nature. Therefore, on ignoring the said evidence, the position would not be different, since the I.O. was not an eye witness and the fact as to identity of the petitioner and his gross and criminal negligence have been proved on records through the evidence of Deepsingh and Anjuben and not through the evidence of the I.O. and his F.I.R.

36. This approach would stand fortified by a decision of Hon'ble the Supreme Court in the case of State of Punjab Vs. Naib Din reported in 2001 AIR SCW 3928. The observation in paras 12 and 16 may be reproduced as follows :-

"12. That apart, respondent failed to show that there was any failure of justice on account of the omission to put a question concerning such formal evidence when he was examined under Section 313 of the Code. No objection was raised in the trial court on the ground of such omission. No ground was taken up in the appellate court on such ground. If any appellate court or revisional court comes across that the trial court had not put any question to an accused even if it is of a vital nature, such omission alone should not result in setting aside the conviction and sentence as an inevitable consequence. Effort should be made to undo or correct the lapse. If it is not possible to correct it by any means the court should then consider the impact of the lapse on the overall aspect of the case. After keeping that particulars item of evidence aside, if the remaining evidence is sufficient to bring home the guilt of the accused, the lapse does not matter much, and can be sidelined justifiably. But if the lapse is so vital as would affect the entire case, the appellate or revisional court can endeavour to see whether it could be rectified.

16. If such objection was not raised at the appellate stage the revisional court should not normally bother about it. At any rate, the omission to put the question concerning evidence which is purely of a formal nature, is too insufficient for holding that the proceedings were vitiated. The evidence sought to be advanced through the affidavits in this case is, no doubt only of a formal nature."

37. I find that the omission to examine the petitioner on this aspect is not fatal to the case of the prosecution and is of no consequence.

36. An attempt was again made to get benefit of Probation under Section 4 of the Probation of Offenders Act, 1958. In support of the submission, A.P. Raju Vs. State of Orissa, reported in 1995 SCC (Cri.) 675 was relied upon. It also related to an offence punishable under Section 304A of I.P.C. As said above, the petitioner, herein, was found to be guilty of gross criminal and culpable negligence which has taken lives of three humans. Quantum of sentence is again a matter of

discretion of the Court. Two courts below have found it proper to inflict jail sentence on the petitioner. There is no reason to alter the quantum of punishment. Here we may consider paras 11 and 12 of Dalbir Singh Vs. State of Haryana and others, reported in 2000 AIR SCW 1653 and para 7 of the State of Karnataka Vs. Sharanappa Basnagouda Aregoudar, reported in 2002 AIR SCW 1413. They are reproduced for ready reference as follows :-

Paras-11 and 12 of AIR, SCW 2000 1653

"11. Courts must bear in mind that when any plea is made based on S.4 of the PO Act for application to a convicted person under S.304-A of I.P.C., that road accidents have proliferated to alarming extent and the toll is galloping up day-to-day in India, and that no solution is in sight nor suggested by any quarters to bring them down. When this Court lamented two decades ago that "more people die of road accidents than by most diseases, so much so the Indian highway are among the top killers of the country" the saturation of accidents toll was not even half of what it is today. So V.R.Krishna Iyer,J., has suggested in the said decision thus :

"Rashness and negligence are relative concepts, not absolute abstractions. In our current conditions, the law under S.304-A, I.P.C. and under the rubric of negligence, must have due regard to the fatal frequency of rash driving of heavy duty vehicles and of speeding menaces."

12. In State of Karnataka v. Krishna alias Raju (1987) 1 SCC 538 : (AIR 1987 SC 861 " 1987 Cri LJ 776) this Court did not allow a sentence of fine, imposed on a driver who was convicted under S. 304-A, I.P.C. to remain in force although the High Court too had confirmed the said sentence when an accused was convicted of the offence of driving a bus callously and causing death of a human being. In that case this Court enhanced the sentence to rigorous imprisonment for six months besides imposing a fine."

Para-7 of AIR, SCW 2002 1413

"7. We are of the view that having regard to

> the serious nature of the accident, which resulted in the death of four persons, the learned single Judge should not have interfered with the sentence imposed by the Court below. It may create and set an unhealthy precedent and send wrong signals to the subordinate Courts which have to deal with several such accident cases. If the accused are found guilty of rash and negligent driving, Courts have to be on guard to ensure that they do not escape the clutches of law very lightly. The sentence imposed by the Courts should have deterrent effect on potential wrongdoers and it should commensurate with the seriousness of the offence. Of course, the Courts are given discretion in the matter of sentence to take stock of the wide and varying range of facts that might be relevant for fixing the quantum of sentence, but the discretion shall be exercised with due regard to larger interest of the society and it is needless to add that passing of sentence on the offender is probably the most public face of the criminal justice system."

38. I respectfully follow the principles of the said latest decisions and accordingly hold that there is absolutely no justification for reduction in punishment or in granting benefit of probation to the petitioner.

For the foregoing reasons, this revision application is ordered to be dismissed. The judgment and conviction orders recorded by the two Courts below are confirmed. The petitioner is on bail. His bail bonds stand cancelled and the petitioner shall surrender to the custody. The office shall immediately send intimation to the trial Court about the order passed by this Court as above, with a view to enable the said Court to issue appropriate warrant to the petitioner and intimation to the surety/sureties so that the petitioner may serve out the remaining sentence. Rule is discharged.

[D. P. Buch, J.]

vrp